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No. 85-1708

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1985

STATE OF CALIFORNIA, et al.,

Appellants,

v.

CABAZON BAND OF MISSION INDIANS, et al.,

Appellees.

On Appeal from the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE STATES OF WASHINGTON, WISCONSIN, AND CONNECTICUT AS AMICI CURIAE IN SUPPORT OF APPELLANTS

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QUESTION PRESENTED

Whether state and local laws prohibiting commercial gambling apply to Indian gambling operations, conducted on Indian reservations, that are patronized primarily by non-Indians.

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INTEREST OF AMICI CURIAE

The states submitting this brief all contain Indian reservations on which Indians are conducting commercial gambling operations, patronized primarily by non-Indians. These gambling operations violate state law. Accordingly, determination of the issues involved in this case will necessarily affect the efforts of these states to apply their criminal laws to these gambling operations.

ARGUMENT

INTRODUCTION AND SUMMARY

By invalidating the provisions of California's criminal code as applied to high-stakes bingo games conducted by Indians on an Indian reservation, the court below has forced upon California a choice that is very disturbing in its practical implications. If California or any other state within the Ninth Circuit is concerned that high-stakes bingo games present a public danger, it can eliminate that danger, at least on Indian reservations, only by completely eliminating, state-wide, bingo games of all sorts, no matter how innocuous. Short of that draconian step, high-stakes bingo games on Indian reservations are beyond the reach of a state's criminal laws and cannot be prohibited, no matter how dangerous the state might judge them to be.

This result, according to the court below, is required by the federal common law, as established by this Court, and by the Congress when it enacted Pub. L. 83-280, 67 Stat. 588 (1953). Because Pub. L. 280 is in effect in the States submitting this brief, the primary focus here is upon the issues raised by that statute, rather than upon the separate set of issues arising under the federal common law. And our basic submission is simply this: In enacting Pub. L. 280, the Congress did not put the Pub. L. 280 States to the inflexible choice which the court below has imposed upon them.

Section 2(a) of Pub. L. 280 provides that the States therein listed:

> * * * shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country * * * to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, *and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory.*

(Emphasis supplied).[1]

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[1]Though not listed in § 2, other States, such as Washington, come within its scope pursuant to § 7. See *Washington v. Confederated Tribes of the Yakima Nation*, 439 U.S. 463 (1979).

Section 2(b), however, provides exceptions to the scope of § 2(a) in several specific areas:

> Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

The court below has, in effect, fashioned an additional exception to the scope of § 2(a). If a state criminal law is deemed by the court to be "regulatory" in nature, then it is not a criminal law at all for purposes of § 2(a), and is thus outside its scope. That the criminal law in question does not fall within the exceptions found in § 2(b) makes no difference.

To be more specific, in holding that Pub. L. 280 did not authorize the application of California's criminal code to the bingo games involved here, the court below based its holding upon a distinction, developed by that court and by the Court of Appeals for the Fifth Circuit, between state criminal laws which are "criminal/prohibitory" and those which are "civil/regulatory". According to these courts, only the former type of law, and not the latter, are applicable to Indian reservations pursuant to Pub. L. 280. Because the provisions of California's criminal code at issue here did not prohibit all bingo, but only high-stakes bingo, those provisions fell into the "civil/regulatory", rather than the "criminal prohibitory" category, and were thus held invalid.

This distinction is and should be rejected by this Court as fundamentally unsound. It is inconsistent with any fair reading of the language of § 2, and finds no support in the legislative history of Pub. L. 280.

The lower federal courts which have fashioned this distinction purport to base it upon this Court's decision in *Bryan v. Itasca County*, 426 U.S. 373 (1976). But that decision does not require or even support any such distinction, which is purely a concoction of the lower federal courts.

Further, this distinction is illusory and impossible to apply in a principled manner, as shown by an examination of the results in the various cases in which the lower courts have attempted to apply it. For it requires those courts to divine a State's "policy" as embodied in the particular criminal statutes involved and to determine, on the basis of the court's perception of that policy, whether a State intends to "prohibit" certain types of conduct, or merely to "regulate" that conduct. The illusory nature of the distinction stems from the fact that criminal laws, when viewed realistically, always do both.

The impact of this distinction is not confined to state law enforcement. It also affects federal law enforcement, as this very case demonstrates. For the distinction has also been engrafted onto the Organized Crime Control Act, 18 U.S.C. 1955, 84 Stat. 937 (1970), as applied to Indians on Indian reservations. That Act makes it a federal crime to operate a gambling business which is "* * * a violation of the law of a State or political subdivision in which it is located." (See J.S. A-25). Thus, the operation of a high-stakes bingo game would be a federal crime in California, if it takes place outside an Indian reservation, but not a federal crime if it is conducted by Indians within a reservation. Surely the Congress did not intend such a double standard, with such a bizarre result.

I. THE "CIVIL/REGULATORY — CRIMINAL/PROHIBITORY" DISTINCTION UTILIZED BY THE COURT BELOW IS ILLUSORY AND CANNOT BE APPLIED IN A PRINCIPLED MANNER.

We first trace the development of the "civil/regulatory — criminal regulatory" distinction and examine the conflicting results and conceptual quagmire which it has produced. That development proceeded in three steps. The

first involved the Assimilative Crimes Act, 18 U.S.C. § 13, 62 Stat. 686 (1948), as applied to Indian sales of fireworks. *United States v. Marcyes*, 557 F.2d 1361 (9th Cir. 1977). The second involved the Organized Crime Control Act, 18 U.S.C. 1955, 84 Stat. 937 (1970) as applied to Indian-operated dice and card games. *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980). And the third step involved Pub. L. 280 as applied to Indian-operated bingo and card games. *Seminole Tribe v. Butterworth*, 658 F.2d 310 (5th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982). *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982), *cert. denied*, 461 U.S. 929 (1983), and the decision below, *Cabezon Band of Mission Indians, et al. v. County of Riverside, et al.*, J.S. A-1.[2]

Taken together, these decisions purport to apply the "civil/regulatory — criminal/prohibitory" distinction for purposes of all three federal statutes. But the results cannot be reconciled on any principled basis.

In *Marcyes*, the Indian defendants had been convicted in District Court of possessing, on the Puyallup Reservation, certain types of fireworks in violation of Washington law, and thus in violation of the Assimilative Crimes Act ("ACA").[3]

All fireworks, however, were not prohibited by Washington; a very detailed line was drawn between "safe and sane" and "dangerous" fireworks. Nor were "dangerous" fireworks absolutely banned; a permit could be granted for their use for certain limited purposes.[4] Nevertheless, the Court found the Washington statutory system to be prohibitory rather than regulatory. The rationale for this holding is set out in the following passage:

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[2]See also *Oneida Tribe v. Wisconsin*, 518 F. Supp. 712 (W.D. Wis. 1981), in which the district court, relying upon *Marcyes* and *Seminole Tribe*, found Wisconsin's bingo law invalid under Pub. L. 280.

[3]While the *Marcyes* opinion does not state explicitly that the defendants were Indians, the opinion in *Barona Group v. Duffy*, 694 F.2d 1185 (9th Cir. 1982) makes this clear. See 694 F.2d at 1188.

[4]This system is contained in Ch. 228, Wash. Laws of 1961, and has been substantially changed since *Marcyes*.

> "Even though the Washington scheme allows for limited exceptions (i.e., public displays, * * * movies, * * *), its intent is to prohibit the general possession and/or sale of dangerous fireworks and is not primarily a licensing law.

Thus, under the ACA, and presumably under Pub. L. 280 as well, the States have the latitude to determine what types of fireworks are "dangerous to the general welfare of its citizens" and what types are not. *Marcyes*, 557 F.2d at 1365. A state law imposing criminal sanctions for the sale or use of "dangerous" fireworks will be considered as "prohibitory," rather than "regulatory," and will be given effect under the ACA and Pub. L. 280.

Yet, under the decision below by the same court, the States have no similar latitude with respect to certain forms of gambling, such as bingo. That a state criminal law prohibiting certain types of fireworks which the State considers dangerous is "prohibitory" for purposes of the ACA and Pub. L. 280, while a state criminal law prohibiting certain types of bingo which the State considers dangerous is not "prohibitory," is indeed puzzling, and illustrates the illusory nature of the "test" purportedly being applied.

We turn to the second step. In *Farris*, both Indian and non-Indian defendants had been convicted in District Court of violating the Organized Crime Control Act ("OCCA") because of their operation of gambling casinos on the Puyallup reservation. "The casinos, without any approval or license of the Washington State Gambling Commission, featured blackjack, poker, and dice * * * " 624 F.2d at 892, 893.

A short explanation of the Washington law involved may be helpful. Under Chapter 9.46 Wash. Rev. Code, "professional gambling" is prohibited. See Wash. Rev. Code § 9.46.220, which prohibits professional gambling, and Wash. Rev. Code § 9.46.020(17), which defines that term.

That definition, however, and therefore the ban itself, has various exclusions which are found in Wash. Rev. Code § 9.46.030. These include, *inter alia*, certain types of bingo games and also "fund raising events" conducted by bona

fide charitable or nonprofit organizations. See Wash. Rev. Code 9.46.030(1). The term "fund raising event" is defined in Wash. Rev. Code 9.46.020(23), and includes almost all forms of gambling games, including card and dice games, but severely restricts the duration and frequency of the events, the amount of funds that may be raised during such event by the sponsoring organization, the use of the funds raised, and the persons who may operate the event.

Nevertheless, the Court in *Farris* found Washington gambling law to be incorporated into the OCCA, stating: "Washington public policy prohibits the type of gambling business conducted by appellants." 624 F.2d at 895.

Moreover, in *dicta*, the Court indicated that Washington's gambling laws would be applicable to the Indian defendants under the ACA as well.

> "* * * [W]e have held that Washington's prohibitory (but not regulatory) laws can be enforced by the federal government on the Puyallup reservation. *United States v. Marcyes*, 557 F.2d 1361, 1364 (9th Cir. 1977); *see United States v. Sosseur*, 181 F.2d 873 (7th Cir. 1950). Like the Washington law against the possession of dangerous fireworks, considered in *Marcyes*, the Washington law against professional gambling is prohibitory despite a number of limited exceptions. *See* 557 F.2d at 1364; Wash. Rev. Code § 9.46.220."

624 F.2d at 897.

The result in the decision below cannot be reconciled with the result in *Farris*. The latitude which the Court in *Farris* accorded to Washington's efforts to prevent dangerous types of gambling has been denied by the court below to California. The holdings in *Farris* and the decision below, moreover, are in flat contradiction. *Farris* upheld Washington's law prohibiting card games, while the court below invalidated the Riverside County ordinance prohibiting the same types of games, stating: "We find no basis upon which to distinguish the Tribe's bingo activities from the Tribe's card parlor games." J.S. A-2, n.1.

Such irreconcilable results should not, however, be entirely unexpected, when one considers the problems in-

herent in any effort to apply the "civil/regulatory — criminal/prohibitory" distinction.

As shown by *Marcyes* and *Farris*, the application of that distinction requires the courts to ascertain a State's "policy" with respect to fireworks, gambling, or whatever other subject is involved. The statutes embodying that policy, however, may contain certain exceptions to it, as was the case with the statutes involved in those two decisions. Yet that policy remained effective, and the exceptions made no difference for purposes of the ACA or the OCCA.

But how many exceptions, and what types of exceptions, will result in the policy no longer remaining *the* policy for purposes of these federal statutes? When do the exceptions become the rule, and embody the policy itself? And what criteria are available to a court to determine if and when that transformation in policy has occurred?

In *Marcyes*, for example, the Court viewed Washington's policy as prohibiting dangerous fireworks. But it could just as easily have viewed Washington's policy as permitting fireworks generally, with the prohibition of certain types of uses of dangerous fireworks as the exception.

While the results in *Farris* and *Marcyes* were certainly correct, their rationale, based upon the regulatory-prohibitory distinction and the search for a State's underlying policy, provided the wrong start. Viewed realistically, the statutes involved in those cases carefully balanced various state interests, and thus embodied several policies, all of which were necessary to accommodate those various interests. In other words, they were typical of the mass of state and federal criminal statutes dealing with any complex subject. For this reason, any search for some single, overriding policy in such statutes is futile.

The basic problem can be stated another way: How does a court select the category of statutory provisions to which it should look in finding a State's policy? In *Farris*, for example, should that category have included *all* of Washington's laws relating to gambling? Or just those relating to card and dice games? This second category itself can be divided into two subcategories, one of which was prohibitory and the other of which was permissive. How

does one determine which of all these categories is to be selected as the one which embodies the State's policy?

Further, even if one changes the focus from a search for a State's "policy" to an examination of the terms "regulatory" and "prohibitory," the illusory nature of the distinction remains. All criminal laws are, we would suggest, designed to "regulate" conduct in a very real sense. For they draw lines, often fairly fine, between conduct which is, for one reason or another, desirable in a society and that which is not, and permit the former, while prohibiting the latter. This is true whether the criminal law is one which prohibits shooting a rifle at another human being, but not at a deer, or one which prohibits high-stakes bingo, but permits bingo with modest payouts. Both sets of laws can be correctly viewed as prohibitory; and just as correctly both can be viewed as regulatory.[5]

A final comment regarding *Marcyes* and *Farris*, the first and second steps in the development of the distinction. While *Bryan v. Itasca County*, 426 U.S. 373 (1976) is cited and relied upon in *Marcyes*, 557 F.2d at 1364, that decision does not yet play a central role.[6] But the proper application of *Bryan* becomes critical in the third step, in which the courts dealt directly with the distinction as applied in the context of Pub. L. 280, which is, of course, the same statute as was involved in *Bryan*.

That third step can be briefly described. It consists of a trilogy of cases, beginning with *Seminole Tribe*, in which the Court of Appeals for the Fifth Circuit struck down

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[5]The Court of Appeals for the Sixth Circuit has recently recognized the illusory and unworkable nature of the distinction:

> Finally, we note the criminal/prohibitory-civil/regulatory test requires courts to make arbitrary classifications of state laws. As states frequently pass laws that to some extent both regulate and prohibit a given activity, the test is difficult to apply.

United States v. Dakota, ____ F.2d (No. 85-1568, July 18, 1986) Slip Op. 6.

The court went on to characterize the distinction as "confusing," while acknowledging that it might be proper for purposes of Pub. L. 280; but the court refused to engraft it onto the OCCA. Slip Op. 7. It thereby expressly parted company with the Ninth Circuit. Ibid., n. 3. For further discussion of *Dakota*, see p. ____, *infra*.

[6]*Bryan* is not cited at all in *Farris*.

Florida's bingo statute. That statute prohibited bingo unless the games were conducted by charitable or non-profit organizations, were limited in frequency and payouts, and were operated only by members of the organization. See Florida Statutes § 849.093, quoted in *Seminole Tribe*, 658 F.2d at 311, 312.

Barona, in turn, considered the California bingo statute to be similar to the Florida statute and thus found *Seminole Tribe* to be "persuasive." *Barona*, 694 F.2d at 1188. And the decision below considered *Barona* to be controlling. J.S. A-5.

In *Seminole Tribe*, the Court read *Bryan* as requiring the use of the "civil/regulatory — criminal/prohibitory" distinction, and read *Marcyes* and *Farris* as doing so as well, 658 F.2d at 313, 315. *Barona* read *Bryan*, *Marcyes*, and *Farris* in exactly the same way. 694 F.2d at 1188, 1189.

We therefore take up the critical question: Does *Bryan* require the use of this distinction in the application of Pub. L. 280?

II. *BRYAN* DOES NOT REQUIRE OR EVEN SUPPORT THE USE OF THE "CIVIL/REGULATORY — CRIMINAL/PROHIBITORY" DISTINCTION.

In *Bryan*, this Court held that § 4 of Pub. L. 280 does not authorize the taxation of reservation Indians. In so holding, the Court construed § 4, which confers civil jurisdiction upon the States, as authorizing only the application of civil laws by state courts in resolving disputes in which an Indian is a party, and not the whole range of state noncriminal laws. *Bryan*, 426 U.S. at 383.

> "Piecing together as best we can the sparse legislative history of § 4, subsection (a) seems to have been primarily intended to redress the lack of adequate Indian forums for resolving private legal disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes; * * *" 426 U.S. at 383.
>
> "This construction finds support in the consistent and uncontradicted references in the legislative history to 'permitting' '*State courts to adjudicate* civil

> controversies' arising on Indian reservations, HR Rep No. 848, pp 5, 6 (emphasis added), and the absence of anything remotely resembling an intention to confer general state civil regulatory control over Indian reservations." 426 U.S. at 384.

The Court in *Bryan* was not, we must emphasize, construing § 2, the authorization of criminal jurisdiction, but only § 4. Indeed, in construing § 4, the Court limited the scope of that section because it perceived § 4 to be less important than § 2.

> "Thus, provision for state criminal jurisdiction over offenses committed by or against Indians on the reservations was the central focus of Pub. L. 280 and is embodied in § 2 of the Act, 18 USC § 1162." 426 U.S. at 380.

There is no suggestion whatever in *Bryan* that the scope of § 2 itself was to be pared back. Nor can any such suggestion be found in the legislative history of Pub. L. 280. See HR Rep. No. 848, 83d Cong., 1st Sess. (1953) and S. Rep. No. 699, 83d Cong., 1st Sess. (1953). See also the unpublished transcript of hearings on HR 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83d Cong., 1st Sess. (1953), referred to in *Bryan*, 426 U.S. at 383, n. 9.

Bryan does, nevertheless, implicitly raise a question about the scope of § 2, which undoubtedly has played a role in the development of the "civil/regulatory — criminal/prohibitory" distinction. Can a State circumvent the holding of *Bryan* engrafting criminal sanctions onto its tax laws, for example, and thereby make them applicable to reservation Indians?

We would agree that the States may not do this. But the reason is not to be found in the illusory distinction developed by the lower courts. Rather, it is to be found in the language of § 2(b). As that language clearly shows, Congress anticipated the possibility that States might use their system of criminal laws, under authority of § 2(a), to impose taxes on reservation Indians, to exercise land use control over Indian property, and to regulate Indian hunting and fishing rights. And Congress, in § 2(b), carefully

excluded from the scope of § 2(a) any such use of its criminal law system.

In short, Congress itself recognized the broad sweep of § 2(a), and explicitly cut it back by adding § 2(b). Nothing in *Bryan* requires that § 2(a) be cut back even further. For it is § 2(b) which prevents any circumventing of the holding and rationale in *Bryan*.

III. THE ORGANIZED CRIME CONTROL ACT DOES NOT INCORPORATE THE "CIVIL/REGULATORY — CRIMINAL/PROHIBITORY" DISTINCTION.

The decision below makes an unworkable shambles not only of § 2 of Pub. L. 280, but of the OCCA as well. And it does so in the same manner, i.e., by engrafting the "civil/regulatory — criminal/prohibitory" distinction, and the state "policy" test, onto the OCCA. As stated in that decision:

> In *United States v. Farris*, 624 F.2d 890 (9th Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981), this court held that whether a tribal activity is "a violation of the law of a state" within the meaning of the OCCA depends on whether it is contrary to the "public policy" of the state. *Id.* at 895-96; *Barona*, 694 F.2d at 1190. "Thus, *Farris* makes co-extensive the tests for application of state law to Indian reservations under [the OCCA] and for direct application of state law under Public Law 280." *Barona*, 694 F.2d at 1190. Because we have concluded that bingo games are not contrary to the public policy of California, the activity is not violative of the OCCA. J.S. A-6.

As applied to the OCCA, the result of the decision below is bizarre. The OCCA, 18 U.S.C. § 1955, imposes criminal penalties for the operation of an "illegal gambling business," which is defined as a gambling business which "is a violation of the law of a State or political subdivision in which it is conducted." 18 U.S.C. § 1955 (b)(1)(i).

Unlike Pub. L. 280, the OCCA is applicable outside Indian reservations as well as within them. Thus, a high-stakes bingo game would be an "illegal gambling business," and subject to the OCCA, if it took place outside an Indian

reservation in California. For, outside the reservation, there is no reason why the language of the OCCA should not be applied as written.

Yet inside the reservation, that same language must be given a different meaning under the decision below, by reason of the "criminal/prohibitory — civil/regulatory" distinction. And thus an illusory distinction leads to an additional absurd result.

The court below has given no reason as to why Congress might have adopted such a dual standard for the application of the same language. And we would submit that none can be found.

The proper approach in applying the OCCA to Indian gambling operations is that adopted by the Court of Appeals for the Sixth Circuit in *United States v. Dakota, et al.*, ___ F.2d ___, (No. 85-1568, July 18, 1986), *supra*. The Court expressly rejected the "civil/regulatory — criminal/prohibitory" distinction in applying the OCCA to an Indian-operated, tribally licensed gambling operation which included blackjack, dice, and poker. *Dakota*, Slip. Op. 2. The State law involved was Mich. Comp. Laws Ann. 750.301, et seq., which permitted casino gambling of the sort operated by the Indian defendants, but only if it was not "commercial," i.e., only if the operator was a bona fide religious, educational, service, senior citizens, fraternal or veterans organization which operated the gambling games without profit. Ibid. 7, n. 4. Because the defendants operated the games for profit, the games were non-commercial; thus, a violation of Michigan law was found, and the OCCA was held applicable.

The court's approach was straightforward, relying upon the plain language of the OCCA and the Michigan law:

> Free from the constraints of the confusing criminal/prohibitory-civil/regulatory analysis, resolution of the instant appeal is not difficult. The issue becomes simply whether the Dakotas' gambling business is in violation of the laws of Michigan. Clearly, it is.

Ibid. 7.

By this approach, the court avoided the double stand-

ard which the court below has read into the OCCA, under which the OCCA changes meaning as it crosses the reservation boundary.

Such a straightforward approach is especially appropriate in cases such as *Dakota* and the case at bar, in which the application of the OCCA presents no possible conflict with an Indian treaty right.[7] This is shown by *United States v. Dion*, ___ U.S. ___, (No. 85-246, June 11, 1986, 54 L.W. 4615), in which the Court upheld the conviction of an Indian for shooting bald eagles within a reservation in violation of the Endangered Species Act, 16 U.S.C. § 1531, et seq., 87 Stat. 884, as amended. Having determined that the Eagle Protection Act, 16 U.S.C. § 688 et seq., 54 Stat. 250, abrogated any treaty right to the hunting of bald eagles, the Court applied the Endangered Species Act in accordance with its terms, despite the silence in that Act and in its legislative history regarding Indian hunting rights. See 54 L.W. at 4617, 4618.

The Court found no double standard in the Endangered Species Act, one for reservation Indians and another for everyone else. Nor should the Court find one in the OCCA.

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[7]So far as we can tell, the Appellees make no claim that they have a treaty right to run gambling operations which cater to non-Indians. And even if they did, such a claim would not bar the application of the OCCA, even in the Ninth Circuit, as shown by *Farris*. See 624 F.2d at 893.

CONCLUSION

For the reasons given above, the decision of the Court of Appeals for the Ninth Circuit should be reversed.

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